(13)

Supreme Court, U.S.
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No. 01-729

In The
Supreme Court of the United States

GLENN G. GODFREY and BRUCE BOTELHO,

Petitioners,

v.

JOHN DOE I, JANE DOE, and JOHN DOE II,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

(a). The Respondents.

Seventeen years ago, John Doe I was convicted of intra-family sexual abuse and sentenced to 8-years in prison.[1] He was released from prison in 1990 to serve out a period of mandatory parole and supervised probation. *Id.* Citing his low risk for reoffense and his compliance with treatment program requirements, the Alaska Board of Parole released him two years early to serve out the remainder of his supervised probation. *Id.* He has long since completed his probation, and has been unconditionally discharged, with all of his civil rights restored. *Id.* He is not a pedophile, and treating professionals stated it was unlikely that he would commit another offense. *CR 28.*

After his release from prison, the Alaska Superior Court made a judicial determination that John Doe I was successfully rehabilitated, and it awarded him custody of his minor daughter. *CR 18.* He has since remarried, he has established a business, and he has reunited with his children, including the victim of his offense. *Id.*

Jane Doe is married to John Doe I. *CR 18.* Jane is employed in a professional capacity and she has never been convicted of a criminal offense. She married John Doe I after his release from prison, and was aware of his criminal history. *Id.*

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[1] *District Court, Clerk's Record, Documents filed under seal in support of Docket 18*, hereinafter cited as CR 18.

John Doe II was convicted 18-years ago and sentenced to serve 8-years in prison. *CR 18, Affidavit of John Doe II.* He was released on mandatory parole in 1990, with no residual period of probation. *Id.* He complied with program requirements, successfully completed mandatory parole and was unconditionally discharged in 1992. All of his civil rights were restored, and he is gainfully employed. *Id.*

(b). Pre-1994 Rights.

The Alaska Sex Offender Registration Act ["ASORA"] significantly diminished respondents' pre-existing rights under the Alaska Constitution and state law. After serving their sentences, the Does had the right to be unconditionally discharged with all civil rights restored. *Alaska Stat.* 12.55.185(15); *Alaska Stat.* 33.30.241.

Among these rights is the right under Article I, § 12 of the Alaska Constitution to be reintegrated into society, and to seek to become the object of respect, rather than the object of fear or loathing by their fellow citizens. *Abraham v. State*, 585 P.2d 526, 531 (Alaska 1978). This right to seek reintegration as a full member of society is a right guaranteed by the Alaska Constitution and protected by the Due Process Clause of the 14th Amendment. *Ferguson v. Department of Corrections*, 816 P.2d 134, 139-140 (Alaska 1991). Although the constitutional provision conveying this right was amended in 1994, *18th Legislature's Legislative Resolve No. 58*;[2] the right remains.

[1] Art. I, § 12, entitled "Criminal Administration" was amended in 1994 to add what is commonly referred to as the "victims rights", and now reads, in relevant part: "Criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of the victim of crimes,

(Continued on following page)

Alaska Stat. 12.55.005 (2000); *Mathis v. Sauser*, 942 P.2d 1117, 1124 (Alaska 1997) *citing, Ferguson.*

The Does also had a specific right of privacy guaranteed by the Alaska Constitution, and protected by the Due Process Clause of the 14th Amendment. *Alaska Const.* art. I, § 22; *Breeze v. Smith*, 501 P.2d 159, 168 (Alaska 1972). This specific right of privacy was created in the 1970's when the State, using federal grant funds, was developing the Alaska Justice Information System, ["AJIS"] a computerized database of information on the criminal history of individuals. *Inf. Op. Att'y Gen.* 663-86-0479, pp. 18-23 (Dec. 10, 1986). Fearful that such a system was the precursor of a "Big Brother" governmental information bureaucracy, legislators responded with Article I, § 22, which was overwhelmingly approved by the voters and which states: "The right of the people to privacy is recognized and shall not be infringed." *Alaska Const.* art. I, § 22. Inclusion of the right to privacy was intended to exert control over the AJIS system, prohibiting public disclosure of criminal records and other governmental records, and to avoid similar potential abuses with all future systems. *Id.* Responding to adoption of the right of privacy, the legislature adopted the Criminal Justice Information Systems Security and Privacy Act, which limits access to criminal history information. *Alaska Stat., Title 12, Chapter 62.*

Next, the Does had the right to be let alone, especially in one's home. *See Carey v. Brown*, 447 U.S. 455, 470-471

restitution from offender, and the principal of reformation." *Alaska Const.*, art. I, § 12.

(1980); *See generally Lewis, The Jacob Wetterling Crimes Against Children & Sexually Violent Offender Registration Act: An Unconstitutional Deprivation of the Right to Privacy and Substantive Due Process*, 31 Harv. C.R.-C.L. L. Rev. 89 (Winter 1996). Encompassed within this important right is the right to be free from unwarranted governmental suspicion, and the right to be free from government initiated intrusions through vigilantism. *Lewis, supra*. This includes the right to personal safety. *Lewis*, 31 Harv. C.R.-C.L. L. Rev. at 106-07.

Additionally, the Does had the right to seek out and engage in employment, and to seek rewards of their own industry. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 n. 23 (1976), *citing Truax v. Raich*, 239 U.S. 33, 41 (1915). The right to pursue employment is likewise a fundamental liberty interest. *Id.*

Although the Does were unconditionally discharged, reintegrated, productive citizens of Alaska, with all civil rights restored to them, the Alaska legislature decided that they were dangerous, they should be required to register with the police four times per year, they should be supervised for life and have their personal information and their status of "registered sex offender" announced to the world. *1994 Alaska Sess. Laws, ch. 41, § 1.* The only factor triggering an invasion of protected rights and disenfranchising the Does by labeling them with a badge of infamy [a scarlet letter] is the past conviction. *Alaska Stat.* 12.63.100, *1994 Alaska Sess. Laws, ch. 41, §§ 12, 13.*

(c). The ASORA.

In enacting the ASORA, legislative focus was on sex offenders, and the need to infringe this group's liberty

interests, such as the right of privacy. *1994 Alaska Sess. Laws, ch. 41, § 1.* Indeed, ASORA specifically diminishes the right of privacy by stating it is "less important than the government's interest in public safety." *Id.* The ASORA compels the Does to gather, collate and disclose information to the State so it may be included in a government information database labeling the Does as dangerous persons to be avoided.[3] *Id.* The ASORA requires a subclass of this select group of reintegrated Alaska citizens to report the same information four times per year for the rest of their lives, and the Does are among this subclass. *Alaska Stat.* 12.63.020 (1998). The provisions compelling compliance, and creating the reporting requirements are

[3] It is not true that the ASORA merely allows collection and dissemination of "truthful" information so the public can make their own assessment as to dangerousness. *Pet. Br. 25.* The intent to declare all registrants as presently dangerous persons to be actively avoided is evident from certain amendments to *Alaska Stat.* 11.51.100(a)(2) [*1998 Alaska Sess. Laws, ch. 99, § 5*] *Alaska Stat.* 47.10.011(7) [*1998 Alaska Sess. Laws, ch. 99, § 18*], & *Alaska Stat.* 34.70.050 [*1998 Alaska Sess. Laws, ch. 45 § 54*]. Under these amendments, sale of a home requires disclosure of the registration list, a child in need of aid proceeding can commence if the registered sex offender lives in a home where a minor child resides, and a person can be convicted of a Class C felony, subject to five years in prison, if they let the children go fishing, camping, or generally stay the weekend with their grandfather or grandmother, if either of those grandparents are a registered sex offender.

The legislature is clearly declaring that all registered sex offenders are presently dangerous, and must be actively avoided, and that the public cannot be trusted to make that determination, for if they do so and let the grandchildren go fishing with their grandfather, they are subject to felony prosecution. The so called "truth" the State seeks to disseminate is that all persons previously convicted of a sex offense, regardless of the facts of the individual case, are presently dangerous, will remain dangerous for life, and should be disenfranchised with a modern day scarlet letter indelibly inscribed on their forehead.

codified in Title 12 of the Alaska Statutes, which are part of the State's criminal code, while the administrative and implementation provisions are placed in that section of the code governing the Department of Public Safety [State Police], the Agency charged with administering the sanctions imposed by the ASORA. *See, e.g., Alaska Stat.* 18.65.010-087 (2001).

In enacting the ASORA, the legislature made substantiative and important amendments to the State's criminal code. Criminal Rule 11 was amended to require the court to inform a defendant in writing of the registration and public notification provisions for plea agreements involving a sexual offense. *1994 Alaska Sess. Laws, ch. 41, § 10.* The amendments also require inclusion of the registration and public notification provisions as part of the written judgment in any case involving a sexual offense. *1994 Alaska Sess. Laws, ch. 41, § 3.*

The ASORA was intended as a means of supervising persons convicted of a sex offense and keeping a clearly definable group under the watchful eye of the State. *Minutes of Hearing Before House Judiciary Comm.*, 20th Alaska Legis., 1st Sess. (Jan. 27, 1997). In fact, in amending the 1994 version of the ASORA, the legislature stated an intent to shorten the time between release from prison and registration so as to decrease the time sex offenders might be unsupervised. *Id.* This intent to keep persons previously convicted of a sex offense under supervision of the State is also clear from the face of the ASORA.

By threat of prosecution and imprisonment, the ASORA requires a person convicted of a sex offense to gather, collate, verify, and deliver a variety of information about themselves and their crimes to the local state

trooper post or police department. *Alaska Stat.* 12.63.010(b) (1998). ASORA even requires registrants to collect and release mental health records and provide information about scars, tattoos, etc. Upon delivery of the information, the individual must allow a photograph to be taken, and provide a set of fingerprints. *Id.* Once the initial registration is completed, registered persons are required to immediately report a change in their address, or a change in the motor vehicles they drive or to which they have access. *Alaska Stat.* 12.63.010(c) (1998). Registrants, like the Does, who fall under the newly defined category of having been convicted of an aggravated sex offense must resubmit the same information four-times per year for the rest of their lives. *Alaska Stat.* 12.63.010(d)(1), 12.63.020(a) (1998).

By allowing unlimited public dissemination of personal information collected and collated by the Does, the ASORA places the Does at substantial risk of loss of housing, employment and community condemnation.[4] *Alaska Stat.* 18.65.087 (1998). Moreover, a scarlet letter attaches when the State places a picture with a host of private information on the Internet with an inscription, "registered sex offender".[5] http://www.dps.state.ak.us/nSorcr/asp

The ASORA contains no procedures through which one may escape its requirements, and no procedure is

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[4] See generally, Brief of New Jersey Public Defender as Amicus Curiae, discussing effect of these "Megan's Laws."

[5] See generally, Brief of Public Defender Service, D.C. as Amicus Curiae, discussing history of shaming punishments and punishments aimed at generating community condemnation.

mandated or even available to determine the degree of risk posed by individual registrants before registration and periodic reporting is required or before information is released to the public. *Id.* The information released to the public includes a photograph, name, home address, place of employment, crimes for which convicted, date and place of conviction, length of sentence, aliases, physical description, description of motor vehicles, license number of motor vehicles, vehicle identification numbers, mental health records, and a description of scars and tattoos. *Alaska Stat.* 18.65.087(b) (1998). The description of motor vehicles is not limited to those owned by the registrant, but includes vehicles to which the registrant has access. *Id.* The applicability provisions of the ASORA require that it be applied retroactively to persons whose offenses were committed prior to its effective date. *1994 Alaska Sess. Laws, ch. 41, § 12; 1998 Alaska Sess. Laws, ch. 106, § 25.* Under these onerous provisions, a registrant required to register for life could be called into the police station at any time and for any reason whatsoever. *Alaska Stat.* 12.63.010(d)(2) (1998).

(d). Evidence Before The District Court.

In seeking and opposing summary judgment before the district court, the Does submitted several exhibits, which were filed under seal to protect the identity of the affiants.[6] The State never contested or rebutted any of this

[6] Exhibits 1-11 are listed as documents filed under seal in support of Docket 107, and will hereinafter be cited as CR 107. Exhibits 12-16 are listed in the court's record as documents under seal filed in support of Docket 101 and will hereinafter be cited as CR 101.

evidence, including the evidence that the State itself used the ASORA to discriminate against family members of a registered sex offender. *CR 101, Exhibit 13.*

The first eight of these exhibits demonstrated beyond doubt that the Alaska public reacts violently when given information regarding the whereabouts of persons previously convicted of an offense. *CR 107.* Exhibit 1 shows signs posted in an individual's yard. *Id.* Exhibits 2 & 3 discloses that a proposed half-way house was burned by what was described as vigilantes. *Id.* Exhibits 4, 5 & 6 documents placement of the sex offender registration list on the Internet, and Exhibit 7 proves that lawmakers knew that widespread public knowledge of past criminal histories could be harmful to those whose histories are released to the public. *CR 107.* After publication of the registration information on the Internet, complaints about an apartment building where sex offenders were being housed resulted in all offenders living there loosing their housing. *CR 107, Exhibit 8.*

In Exhibit 9, a former field service probation officer from the State of Alaska, Department of Corrections ["ADOC"] opined that the ASORA was nothing more than an extension of post-incarceration supervision. *CR 107.* She reached this conclusion based upon her expertise in the field, and based upon her review and knowledge of existing supervision mechanisms then existing in Alaska law. *Id.* Her affidavit also provided the Court with considerable insight as to the effect of the ASORA.

During her term of employment with ADOC, this probation officer supervised hundreds of released individuals who had been convicted of a sex offense. *Id., p. 2.*

She was familiar with the ASORA's requirements and was employed by ADOC when it went into effect. *Id., p. 3.* During that time, she supervised only those persons who had previously been convicted of a sex offense, and she witnessed persons on her case load losing their housing and employment due to the public disclosure requirements of the ASORA. *Id., p. 4.* Moreover, she saw first hand how the ASORA invaded the marital home and caused offenders to move out to protect their families. *Id.* Based on her years of professional experience, she opined that the ASORA had a punitive effect on those individuals being released and who were attempting to reintegrate into the community. *Id., pp. 4-5.* She also concluded that the ASORA had a "regressive impact on individuals who were previously successful in their reintegration into the community." *Id.*

Exhibits 10 & 11 proved that the ASORA undermined the offender's ability to seek out and maintain employment. *CR 107.* Indeed, the affidavit from one employer, who had previously hired persons convicted of a sex offense, stated he would no longer do so if the State was going to publish his business name on the Internet. *Id.* This employer was also concerned that the release of the information would cause future applicants to attempt to hide information, lie on applications for employment, and would affect the interpersonal relationships necessary for productivity in a service related business. *Id.* Other employers had the same concerns. *Id.*

The Affidavit of BB sets forth a telling example how the children of those subjected to the ASORA suffer from its punitive effects, and how the ASORA undermines the ability of an offender to reintegrate into the community. BB was a young man who has never been convicted of any

offense, and who was a junior in high school. He suffered humiliation and trauma because his father was required to register as a sex offender. *CR 101, Affidavit of BB, p. 2.* Moreover, just when this young man was establishing relationships that may last a lifetime, those relationships terminated because the State chose to tell the world that his father was a sex offender that should be considered dangerous. *Id., p. 3.* Even worse, this young man graduated from high school feeling like he was singled out and treated differently from other children merely because the State decided to publish his father's past on the Internet. *Id.*

The ASORA not only harms the registrant's children, but it invades the personal relationships the offender established after his release. Indeed, ML was employed as a mental health counselor, who was working on her Masters Degree in Clinical Social Work. *CR 101, Exhibit 13, Affidavit of ML.* She married a man who was previously convicted of a sex offense, only after she had talked to his probation officer and knew about his entire background and his risk for reoffending. *Id.* After the State chose to tell the world that ML's husband was a sex offender who should be considered dangerous, she tried to complete her practicum with a State Agency. *Id.* ML was first accepted by that Agency, but later rejected solely because her husband's name was published on the sex offender registration list. *Id.*

ML also had several problems at work as a result of the publication, but she chose not to interview for any new positions that may have furthered her career. *Id.* In fact, she put her career on hold, was forced to change her name, and suffered from severe emotional upset and depression because the State chose to publish information about her

husband's past. *Id.* In ML's words, "I don't think its right that I should be ostracized and punished simply because of who I chose to marry, but that is what has happened because of the State's publication of registration information." *Id., p. 7.* ML said "[m]yself and my children suffer daily because of this list and because the State chose to punish me based on who I decided to marry." *Id.*

A woman with no criminal record whatsoever owns a business and serves major clients. *CR 101, Exhibit 15, Affidavit of LB.* She happens to be married to a man who was previously convicted of a sex offense. *Id.* The forced registration and public notification provisions of the ASORA cause her to suffer severe emotional trauma, and nearly destroy her business because major clients stop using her services after the State told the public that her husband is a sex offender that should be considered dangerous. *Id.* Printouts of her husband's information, published by the State, were circulated to clients of LB's business along with a picture. *Id.* Like the erroneous information describing her husband as a dangerous sex offender, his picture was provided by the State, as was the fact that her husband worked in her business. *Id.* LB describes the effect of the ASORA by saying:

> I have seen the harmful effects release of this information has had on my family and I feel that the State of Alaska, by associating my address and my business with my husband's previous offenses, has made me a victim. Until they have gone through it themselves, no one can imagine the emotional upset, embarrassment and humiliation a family must suffer because the State has chosen to compile this information and release it to the world, with no restrictions whatsoever on its use. *CR 101, Exhibit 15 p. 4.*

Notwithstanding the uncontested evidence of excessiveness in relation to the ASORA's assigned purpose, the district court concluded that the ASORA was regulatory, not punitive and retroactive application was not barred by the Ex Post Facto Clause. *Pet. App. 91a.* The Court of Appeals for the Ninth Circuit reversed that decision, and this Court granted certiorari. *Pet. App. 42a.* The Ninth Circuit's ultimate conclusion that the ASORA imposed additional punishment and could not be applied retroactively without violating the Ex Post Facto Clause should be affirmed.

(e). Response to certain misconceptions on the part of petitioners and their amici.

1. This case is not about public access to criminal records.[7] Compelling an individual to compile and produce personal information and photographs, which are then used to label him with a badge of infamy and to supervise that individual for life, purportedly for the sake of public safety, is entirely distinct from public access to court records.[8] This case is about changing the quantum of

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[7] See generally, Brief of Reporters Committee as Amicus Curiae.

[8] These overly broad and punitive laws are justified as an extreme measure in response to the unique and severe threat sex offenders pose to public safety. *Brief of United States, As Amicus Curiae, pp. 2-3.* However, if regulation of the individual is sanctioned as a valid exercise of the State's civil, regulatory authority, let no one doubt that exercise of that immense power over the individual will not end with sex offender registration. *Resp. App. 28a.* In fact, the Alaska legislature has already moved towards expanding this power. In 1996, a Bill was introduced in the Alaska legislature that would have established the same punitive registration requirements for people who abuse their pets. *Resp. App. 28a.* Senate Bill 238 was introduced in January 1996,

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punishment, after the fact, as evidenced by ASORA's mission to expand the State's power to regulate the person and not merely his participation in a regulated profession or activity. Regulation of the individual is *based solely on a past criminal conviction*, and occurs even after he is unconditionally discharged from his criminal sentence. ASORA's sanction not only places invasive conditions on the person, it seeks to "regulate" all of his community relationships, social, professional and personal, by labeling him an undesirable to be shunned. Such governmental exposure to infamy is historically punitive, not regulatory.[9] Indeed, it is quintessentially the function of criminal, not civil, law to restrict liberty and attach stigma to a judgment of conviction for the sake of community protection. *See, e.g., United States v. Brown*, 381 U.S. 437, 458 (1965) ("One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any less punishment"); *4 W. Blackstone, Commentaries*, 11-12 (criminal law seeks to "depriv[e] the party injuring of the power to do future mischief"); *Apprendi v. New Jersey*, 530 U.S. 466, 484 (2000) (criminal punishment consists of "the loss of liberty and the stigma attaching to the offense"); *Breed v. Jones*, 421 U.S. 519, 529 (1975) (double jeopardy applies in juvenile proceedings because they attach potential loss of liberty and stigma to adjudication of guilt); *Mullaney v. Wilbur*, 421 U.S. 684, 697 (1975) (criminal law implicates

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and although it failed to pass, it constitutes clear evidence that these registration laws will not be limited to sex offenders or unique, severe risks to public safety.

[9] See Brief of Public Defender Service, D.C., As Amicus Curiae.

"the defendant's critical interests in liberty and reputation").[10]

2. This Court has not "observed" that sex offender registration has not traditionally been regarded as punishment.[11] Rather, in *Lambert v. California*, 355 U.S. 225, 229 (1957) this Court held that sex offender registration laws differ significantly from those laws which regulate activities. Moreover, this Court held that sex offender registration laws may be too severe for an average member of the community to bear, and that the severity lies in the absence of an opportunity to avoid the law or to defend against any prosecution brought under it. *Lambert*, 355 U.S. at 229; and see *Kansas v. Hendricks*, 521 U.S. 346, 360 (1997) (regulation of the individual through civil commitment based solely on the prior conviction would not be sustained in the face of constitutional challenge).

3. This Court is not bound by the Ninth Circuit's conclusion that the ASORA was intended as a regulatory mechanism designed to protect the public through the collection and dissemination of information. *Pet. Br. 16. See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 510 (1984). Rather, the Court is free to evaluate the ASORA, on its face, and conclude it should be classified as penal for purposes of the Ex Post Facto Clause. In fact, this Court has always applied a *de novo* standard of review when faced with the question whether the law then before it imposed a punishment. *See, e.g., Kennedy v.*

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[10] *Id.*, fn. 6.

[11] Brief of California, ex rel. 41 States as Amicus Curiae, p. 12.

Mendoza-Martinez, 372 U.S. 144 (1963); *Hudson v. United States*, 522 U.S. 93 (1997).

4. This Court does not rely on subjective motivations of the legislature in determining intent. *Lynce v. Mathis*, 519 U.S. 433, 442 (1997). Rather, this Court will focus on a variety of factors considered in relation to the ASORA on its face. *Seling v. Young*, 531 U.S. 250, 251 (2001). The factors this Court has considered include, among others, comparison with other provisions, legislative focus and the extent to which the legislature amended existing law. *Flemming v. Nestor*, 363 U.S. 603, 613 (1960); *Mendoza-Martinez*, 372 U.S. at 180-184; *Hendricks*, 521 U.S. at 360. If the legislative focus was on the group of persons to be regulated, punitive intent will be presumed. *Flemming*, 363 U.S. at 613.

5. Respondents are not required to show that the "stated intent is merely a charade for punitive goals." *Pet. Br. 15*. Nor, are respondents required to show ill-will or bad faith on the part of the legislature. *Id.* The "clearest proof" standard is not an insurmountable burden requiring a showing of ill motive or bad faith, because statutes are not struck down based on ill motive, and this Court does not inquire into the motive of legislators when examining a statute to determine whether it is constitutional. *United States v. O'Brien*, 391 U.S. 367, 383 (1968).

6. Contrary to petitioners' apparent belief that "clearest proof" is an insuperable burden, the phrase arose in *Flemming* "to describe the burden of persuasion necessary to demonstrate a criminal and punitive purpose unsupported by 'objective manifestations' of legislative intent." *Hudson*, 522 U.S. at 113 (Souter, J., concurring) (quoting *Flemming*, 363 U.S. at 617). That concept is of

little assistance to the State in this case since ASORA's objective features are overwhelmingly penal. *See id.* at 112-14; *see also id.* at 115-16 (Breyer, J., concurring). There are numerous cases where the Court has rejected civil labels by examining objective realities, for example, where the Act imposed and affirmative disability or restraint, *United States v. Lovett*, 328 U.S. 303, 316 (1946), where the type of sanction imposed has historically been regarded as punishment, *Cummings v. Missouri*, 71 U.S. 277, 320-321 (1866); where the sanction only came into play upon a finding of scienter, *Helwig v. United States*, 188 U.S. 605, 610-612 (1903); where the Act in question promoted traditional aims of punishment – retribution and deterrence, *United States v. Constantine*, 296 U.S. 287, 295 (1935); where the Act only applied to conduct which was already criminal, *Lipke v. Lederer*, 259 U.S. 557, 562 (1922); where no alternative purpose could rationally be assigned, *Cummings, supra*; and where the effect of the Act was excessive in relation to the alternative purpose assigned to it. *Cummings, supra, Helwig, supra*. Indeed, the Court held that a purported civil scheme was punitive simply because of the severity of the effect and because it had an obvious deterrent purpose. *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767 (1994). Consequently, "clearest proof" is not an insurmountable burden, and though never defined by the Court, it seems to mean nothing more than the legal maxim that statutes enjoy a presumption of constitutionality, which is shed when they are shown to be unconstitutional. *See Flemming*, 363 U.S. at 617.

SUMMARY OF ARGUMENT

1. The ASORA, a law which regulates the person rather than his participation in an activity or profession, and based solely on the past conviction, is punitive. This conclusion is supported by application of the "intent-effects" test, which test is employed by the Court to determine whether a purported civil, regulatory provision should be classified as criminal. *Hendricks*, 521 U.S. at 361.

2. In applying the "intent-effects" test, this Court first looks for a clearly stated preference on the part of the legislature. *Hendricks*, 521 U.S. at 361. If no clear preference exists, the Court examines the ASORA on its face to determine whether it is regulatory in both structure and design. *Id.* In doing so, factors such as codification, triggering events, and existence of procedural protections are some of the factors that guide the Court to its conclusion. *Hendricks*, 521 U.S. at 361. Indeed, in *Hendricks*, this Court found non-punitive intent because the Act was codified in the probate code, and because the Act was not triggered solely by conviction. In *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 363 (1984), this Court held that one of the most important characteristics of a regulatory law is adequate procedural protections.

3. The Court may also seek to determine whether the ASORA amends the criminal law, and whether it imposes additional sanctions generally imposed by laws that are decidedly penal. *See Mendoza-Martinez*, 372 U.S. at 168-169. Moreover, an important element in establishing an objective manifestation of intent is examination of the focus of the legislature in enacting the ASORA. *Flemming*, 363 U.S. at 613-614. If the legislature focused on an activity from which sex offenders should be barred because

of relevant past conduct, a presumption may exist that the legislature intended the ASORA to be regulatory. *Id.* However, the contrary is true if the focus was on the person or class of persons to whom the ASORA applies. *Id.*

4. In applying this facial examination to the ASORA every relevant factor points to punitive intent and the only conclusion that can be drawn is that the legislature intended the ASORA to be penal. Because there is sufficient risk that retroactive application will increase the punishment for past crimes, the ASORA may not be applied retroactively without violating the Ex Post Facto Clause.

5. Where facial examination is inconclusive, or results in a conclusion that the Act in question is decidedly civil, the Court inquires further to determine whether the challenged Act is so punitive either in purpose or effect that it transforms what was intended as a civil remedy into a criminal penalty. *Hudson*, 522 U.S. at 99. In making this determination, several factors are used as guideposts, including:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment – retribution and deterrence, whether the behavior to which it applies is already criminal, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. *Mendoza-Martinez*, 372 U.S. at 168-169 (citations omitted).

6. Respondents need only show that any one of these factors, or any combination of two or more demonstrates that the ASORA is excessive in either its purpose or effect. *United States v. Ward*, 448 U.S. 242, 249 (1980); *United States v. One Assortment of 89 Firearms*, 465 U.S. at 365 n.7. The *Mendoza-Martinez* factors are not exhaustive or dispositive and the weight to be given each factor depends upon the context and type of sanction at issue. *Hudson, supra.*

7. The ASORA is not a regulatory law because it does not seek to regulate any activity from which respondents should be barred due to relevant past conduct. Rather, the ASORA is punitive in intent because the legislative focus was the group of persons previously convicted of sex offenses. Moreover, the ASORA is not only codified as criminal, its enactment resulted in substantive amendments to Alaska's criminal laws, demonstrating it was intended to be an integral part of the criminal law. Furthermore, the ASORA unduly infringes upon private interests, including fundamental rights. Because punitive intent is evidenced from the face of the ASORA, the effects need not be considered and it cannot be applied retroactively to persons whose offenses were committed prior to its effective date if there is a sufficient risk that it will increase the punishment for past offenses. *Lynce, supra*. If punitive legislative intent is not evident by examination of the ASORA, the court will nonetheless classify the law as penal if its objective features demonstrate that it is punitive in either purpose or effect. *Hendricks*, 521 U.S. at 361. In applying the seven *Mendoza-Martinez* factors to the ASORA, one results in ambiguous intent, six weigh in on the side of classifying the ASORA as criminal.

ARGUMENT

A. The ASORA is easily distinguishable from other regulatory laws previously upheld by this Court.

The ASORA cannot reasonably be compared to a regulatory law governing the qualifications for a profession, or establishing eligibility for a governmental benefit. *Pet. Br. 28-29, citing, Hawker v. New York*, 170 U.S. 189 (1898). The ASORA is not aimed at regulating an activity from which an offender should be barred due to relevant past conduct. *Pet. Br. 28-32.*

The central premise in cases such as *Hawker*, *DeVeau v. Braisted*, 363 U.S. 144 (1960), and *Hudson*, is that the government may regulate a specific activity and bar felons from participating if relevant past conduct shows an unfitness to participate. In the instant case, the ASORA seeks to protect the public by deterring future conduct. *Pet. Br. 27-32.* The ASORA regulates the individual by compelling them to gather, collate, verify and deliver information to the State and then swear upon oath that the information is true and accurate. *Alaska Stat.* 12.63.010 (1998). The Does must deliver this information and swear this oath four times per year for the rest of their lives. The distinction between the ASORA and regulation of an activity is unmistakably clear. To feel the harsh consequences of the law that regulates an activity, one must first seek to participate in the activity. The ASORA, on the other hand, comes to the individual and compels him to do what the law requires or suffer the consequences of new criminal charges and imprisonment. Moreover, the ASORA does so based solely on a finding of guilt and it operates on a past conviction. Surely the result

in *Hawker* and its progeny would have been different if the law commanded the individual to collect all relevant data and turn it over to the State, so the State could tell the world that the individual was unqualified to practice medicine or work in any profession, and he should be made an outcast in society to be avoided at all cost. The asserted distinction has been recognized by many renown scholars, and was most eloquently articulated by the Honorable Charles Fried, former Associate Justice of the Massachusetts Supreme Judicial Court. In *Doe v. Attorney General*, 686 N.E.2d 1007, 1016 (Mass. 1997) (Fried, J. Concurring), Justice Fried characterized regulation of the individual as follows:

> Registration presents a different and importantly distinct kind of constitutional danger . . . [it] forces an action on the person required to register. It is a continuing, intrusive, and humiliating regulation of the person himself. To require registration of persons not in connection with any particular activity asserts a relationship between government and the individual that is in principle quite alien to our traditions, a relationship which when generalized has been the hallmark of totalitarian government.

Clearly, reliance on *Hawker* and its progeny is woefully misplaced. *Pet. Br. 28-32*. Although this Court has been reluctant to overrule a legislature's clearly stated intent to regulate a specific activity, which the government has the power to regulate *Pet. Br. 27-32*, this Court has never failed to distinguish between sanctions that come into play as a relevant incident to regulation of an activity, and sanctions that only come into play based upon a criminal conviction. *Hawker, supra, see also Hendricks*, 521 U.S. at 360 (indicating that if the sanction were imposed based

solely on the past conviction, the Act would not withstand constitutional scrutiny).

B. The structure and design of the ASORA compels the conclusion that it is penal.

In enacting the ASORA, the legislature did not clearly state a preference for a regulatory label. *1994 Alaska Sess. Laws ch. 41, § 1*. Petitioners wrongly contend the legislature's findings are conclusive as to the first step in the intent-effects analysis. *Pet. Br. 24*. This is so, because the only support for that erroneous proposition is that the legislative findings evidence a public protection purpose. *Pet. Br. 24*. However, in Alaska, public protection is one of the mandated goals of penal administration.[12] *Alaska Const.*, art. I, § 12. Because it must be presumed that the legislature was aware of the mandated goals of penal administration, *see State v. Alaska Continental Development Corp.*, 630 P.2d 977, 996 (Alaska 1980); it is unreasonable to infer a regulatory purpose from legislative findings aimed at accomplishing one of those penal goals.[13]

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[12] At the time the ASORA was originally adopted, the goals of penal administration were classically known as "twin goals," (*Abraham, supra*), which were protecting the public and reformation of the offender. In 1994, Article I, § 12 of the Alaska Constitution was amended to add provisions for victims' rights, but the twin goals remain, with the additional goal of community condemnation. *18th Legislature's, Legislative Resolve No. 58 (1994)*.

[13] Petitioners' reliance on legislative history to support a preference for a regulatory label is misplaced. *Pet. Brief, p. 25, fn. 12*. A clearly stated preference for a regulatory label should not be established based on a legislature's subjective motivations. "This Court has recognized from Chief Justice Marshall, to Chief Justice Warren, that determining the subjective intent of legislators is a perilous enterprise." *See*

(Continued on following page)

1994 Alaska Sess. Laws ch. 41, § 1. Absence of a clearly stated preference for a regulatory label requires examination of the ASORA on its face to determine whether any factors compel the conclusion that the legislature intended the ASORA to be penal.[14] *Hendricks*, 521 U.S. at 361.

Edwards v. Aguillard, 482 U.S. 578, 638 (1987) (dissenting opinion) (citations omitted). If subjective motivations are relevant, then the subjective motivations of those like Senator George Jacko cannot be ignored. In discussing the ASORA, Senator Jacko was clearly motivated by a punitive purpose because he wanted to give sex offenders a choice between registration or death by electrocution. *Minutes of Hearing Before Senate Judiciary Committee, 18th Alaska Legislature, 1st Sess.* (April 20, 1993). Additionally, a close examination of the legislative history, upon which petitioners rely, shows that the legislature did not clearly state a preference for one label or the other; rather that history shows they intended to pass the ASORA even if it increased the punishment for past offenses, and they believed it would be regulatory because courts in other jurisdictions had so ruled when considering challenges to other state laws. *Id. Pet. Br. 25, fn. 12*. A belief that the law would be found to be regulatory when put under constitutional scrutiny does not mean the legislature intended it to be so. The legislative history being inconclusive, at best, the legislative findings are the only evidence of intent. However, these findings are ambiguous, at best, because they merely evidence a public protection purpose. *Alaska Sess. Laws, ch. 41, § 1.* Because public protection is one of the mandated goals of penal administration in Alaska, these findings are not clear evidence of regulatory intent. *Alaska Const.* art. I, § 12.

[14] Petitioners recognize that reliance on the legislature's findings is not conclusive, so they argue that non-punitive purpose is confirmed by the methods chosen to accomplish the stated purpose. *Pet. Br. 24-25*. While petitioners are correct, that absence of a clearly stated preference for a civil label requires examination of the structure and design of the ASORA, petitioners' reasoning is fundamentally flawed. *Id.* Contrary to petitioners' assessment, the ASORA does much more than merely allow the government to collect truthful information and make it available to those who choose to learn it. *Pet. Br. 25*.

The first factor indicating a punitive intent is codification. *Hendricks*, 521 U.S. at 360. The sections of the ASORA, designed to protect the public by requiring released offenders to register with the authorities, were codified in Alaska's criminal code. In *Hendricks*, this Court found civil, remedial intent based, in part, on the fact that the Act was codified in the Kansas probate code rather than in any portion of the criminal code. *Id.* Here, the registration triggering provisions are codified in Alaska's Title 12 which defines punishment and criminal procedure. *Alaska Stat.* 12.63.010. Codification in the criminal code was intended by the drafters and sponsors of the legislation because the sponsors followed the mandates of the Legislative Drafting Manual, which requires new statutes to be codified in the appropriate sections of the code, depending upon the subject matter and purpose of the legislation.[15] Codification in Title 12 of the Alaska Statutes evidences a criminal intent because "[t]he provisions of [that] title apply to all criminal actions and proceedings" *Alaska Stat.* 12.85.010, and that section of the code it entitled "Code of Criminal Procedure." *Alaska Stat.* 12.85.020. Codification in this Title implies an intent to enact a criminal penalty. *Hendricks, supra.*

Although the implementation provisions are codified in Alaska's Title 18, this does not compel the conclusion that punishment is not being administered. It is customary for a legislature to place punishment provisions in the criminal code, and to place the procedure for administering punishment in that section of the code which governs

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[15] This manual can be found at: http://www.legis.state.ak.us/infodocs/draft_manual/DMWeb/DMcover.htm

the particular agency charged with so administering. As an example, sentences of incarceration and supervision through imposition of probation are found under Alaska's Title 12, Chapter 55. The Department of Corrections carries out the court's sentences and supervises both probationers and parolees, and the procedures for doing so are found in Title 33. Hence, placement of the implementation provisions of the ASORA in Title 18 has no bearing on the intent analysis because the important fact is the punitive portions of the ASORA are found in the criminal code along with other penal provisions.

Objective intent to enact a penalty is also evidenced by the object upon which the legislature focused when enacting the ASORA. *Flemming*, 363 U.S. at 613-614. In this instance the legislature was clearly focused on the group of persons to whom the ASORA applies, and not on an activity from which these persons should be barred due to relevant past conduct. *Id.* Indeed, legislative focus on sex offenders is obvious because the legislature focused on unsupported high rates of recidivism; the need to protect the public from sex offenders; the privacy interest of sex offenders, and the need to carve out of an exception to protections guaranteed by Article I, § 22 of the Alaska Constitution by creating a governmental information database that releases criminal history information and brands the unconditionally discharged, reintegrated prior offender for life. *1994 Alaska Sess. Laws, ch. 41, § 1.* "[W]hen conduct is singled out of a class for specially adverse treatment simply because it is specially provocative, there is no escaping the conclusion that punishment is being administered." *Mendoza-Martinez*, 372 U.S. at 196 (Justice BRENNAN, concurring, citing *Flemming*, 363 U.S. at 635-640 (dissenting opinion)).

Punitive intent is also clear because the ASORA amends the State's criminal code and is similar in purpose and effect of other relevant penal provisions. *Mendoza-Martinez*, 372 U.S. at 183; *id.*, n.35, *citing, Helwig*, 188 U.S. at 613-619. There can be no doubt that the ASORA amended the State's criminal code by requiring its provisions be a written part of any judgment entered as a result of a conviction for a sexual offense. *1994 Alaska Sess. Laws, ch. 41, § 3.* Furthermore, it amended Alaska's Criminal Rule 11 requiring its provisions be part of any plea agreement entered as a result of a sexual offense. *1994 Alaska Sess. Laws, ch. 41, § 10.* In fact, the legislature found the ASORA to be such a critical part of the punishment, that it is the only aspect of Rule 11 plea agreements that the court must put in writing. *Id.* Finally, the uncontested evidence in the record shows the ASORA fulfills the same purpose and in the same manner as other forms of post-incarceration supervision in Alaska. *CR 107, Exhibit 9.* The character of other relevant penal provisions in Alaska, compared to the character of the ASORA, and the fact that the ASORA simply amends existing criminal law, by adding additional penalties and another form of post-incarceration supervision, is clear evidence of punitive intent. *See Helwig*, 188 U.S. at 613-619.

The lack of procedures designed to protect personal liberty, evidences an intent to enact a penalty. *See One Assortment of 89 Firearms*, 465 U.S. at 363. This conclusion is supported by the fact that the petitioners contend the ASORA is regulatory, and by the fact that for a regulatory law to be valid it must be obvious that the interest of the public requires the law's interference, and second, that the means are reasonably necessary for the accomplished purpose and not unduly oppressive upon individuals.

Goldblatt v. Town of Hempstead, N.Y., 369 U.S. 590, 594-95 (1962) *citing, Lawton v. Steele*, 152 U.S. 133, 137 (1894). In other words, the law must be narrowly tailored to achieve the stated purpose. *NAACP v. Alabama*, 377 U.S. 288, 303-304 (1964):

> The power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. *Id.*

The ASORA is not narrowly tailored and it does not contain any procedures designed to protect individual liberty. *Alaska Stat.* 12.63.010-100 (1998). The lack of any procedures designed to protect individual liberty is clear evidence of an intent to punish for past conduct.

The ASORA's imposition of a duty on the offender, which duty is imposed solely as a result of the past conviction, is clear evidence of an intent to establish a criminal statutory scheme. It has long been held that laws which compel the doing of an act, after the fact, violates the prohibition of the Ex Post Facto Clause. *Calder v. Bull*, 3 U.S. (3 Dall) 386, 388 (1798) ("no man should be compelled to do what the laws do not require"). *Calder's* definition of an ex post facto law has endured for over two hundred years. *California Department of Corrections v. Morales*, 514 U.S. 499, 504 (1995). The ASORA is not regulatory because it imposes the duty to report to the authorities, the duty to provide one's fingerprints, the duty to collect and collate information, the duty to swear upon oath the information is true, the duty to provide information that is

otherwise private, and the duty to report to the authorities four times per year for the rest of their lives. No valid regulatory law has ever imposed duties which are triggered solely by the past conviction. *Hendricks, supra.* The *Calder* definition recognizes that restraint not only means confining a person, or holding a person against his will, but it also means to put a compulsion upon the individual. *N.L.R.B. v. Exchange Parts Co.*, 304 F.2d 368, 374 (5th Cir. 1962). By compelling the doing of an act, and eliminating the right of choice, the ASORA does in fact impose a restraint and this is evidence of an intent to punish.

Examination of the structure and design of the ASORA compels the conclusion that the legislature intended to enact a penalty. That being the case, the ASORA should be classified as punishment, retroactive application of which violates the Ex Post Facto Clause. There can be little doubt that if retroactively applied, there is sufficient risk that the ASORA will increase the punishment for past offenses – it imposes a lifetime on an amended version of post-incarceration supervision.

C. Application of the *Mendoza-Martinez* factors compels the conclusion that the ASORA must be reclassified as criminal because it is excessive in its purpose and effect.

It is not true that some of the *Mendoza-Martinez* are irrelevant in an Ex Post Facto Clause inquiry. *Pet. Br. 33.* While some factors might be more important than others, depending upon the facts and circumstances of the individual case, all may be relevant regardless whether the case calls for an Ex Post Facto, Double Jeopardy, or Due Process inquiry. *Id.* This is because, the factors are not

applied to determine whether the sanction violates Due Process, Double Jeopardy, or the Ex Post Facto Clause. Rather, the factors are applied to determine whether a purported civil statute should be reclassified as criminal. *Mendoza-Martinez*, 372 U.S. at 168-169. If the statute is really criminal, then traditional Double Jeopardy, Due Process or Ex Post Facto analysis is then applied to determine whether it fails under the particular constitutional provisions under which the Act is being challenged. Because the challenge here is brought under the Ex Post Facto Clause, if application of the *Mendoza-Martinez* factors proves the ASORA is criminal, then it may not be applied retroactively if there is a sufficient risk that it may increase the punishment for past offenses. *Lynce*, 519 U.S. at 441.

In making the inquiry, whether the ASORA is penal in operation and whether there is sufficient risk that it increases the punishment for past offenses, the subjective intent of the legislature is irrelevant and the Court will look to the consequences of the ASORA's application and enforcement. *Lynce*, 519 U.S. at 440. Application of the *Mendoza-Martinez* factors under this operational approach compels the conclusion that the ASORA must be classified as penal, and it may not be applied retroactively to persons whose offenses were committed prior to its effective date.

Factor 1, Affirmative disability or restraint.

The ASORA imposes an affirmative disability or restraint because it places registrants at a serious disadvantage and it limits or prevents the exercise of fundamental rights. Moreover, the ASORA labels registrants

with a scarlet letter, subjects them to community scorn, and outrage, and it subjects registrants to a lifetime of governmental supervision and monitoring, which is the fundamental equivalent to a lifetime on parole or probation. *See Brief of Public Defender Service, D.C., As Amicus Curiae.*

It is not true that disability or restraint only equates to incarceration. *Pet. Br. 37-38.* Disability or restraint includes inflicting deprivations on an individual in order to prevent his future misconduct. *United States v. Brown*, 381 U.S. at 458-459. In *Cummings*, the Court disagreed that a disability or restraint only exists when the sanction involves physical restraint on the individual. *Cummings*, 71 U.S. at 322. The Court recognized that restraint takes many forms and "[t]he deprivation of any rights, civil or political, previously enjoyed, may be punishment. . . . " *Id.* Moreover, the Court noted that counsel for the government did not include within his definition of liberty, freedom from outrage on the feelings, and the Court held that deprivation of rights or privileges vested under prior law could constitute punishment. *Id.* The most important determinative factor was "the circumstances attending and the causes of the deprivation." *Id.*

Here, the Does had a right under Alaska law to reintegrate into society and to be left alone. *Abraham*, 585 P.2d at 531. This right is fundamental and protected by the Due Process Clause of the 14th Amendment. *Ferguson*, 816 P.2d at 139-140. Moreover, the Does had the right to unconditional release after service of their sentences and the right to have all their civil rights restored. *Alaska Stat.* 33.30.241, *Alaska Stat.* 12.55.185(15). Compelling the Does to register, coupled with the imposition of conditions such as the duty to report a change of residence, a

change in employer, hair color, type of vehicles, etc., all deprives them of rights and privileges existing under prior law. The circumstance attending a deprivation of these rights is the State's desire to fulfill one of the stated goals of penal administration in Alaska, and the cause of the deprivation is the prior conviction because the ASORA only applies after conviction for a sex offense. *Alaska Stat.* 12.63.100 (1998).[16]

Pasting a scarlet letter on the offender through public notification places the offender at risk of violence, and clearly imposes an affirmative disability and restraint. Examples of violent community response continue to mount and add to the reams of evidence which weigh heavily against criminal registration and public notification. *Jerusalem: A Framework for Post-Sentence Sex Offender Legislation, "Perspectives on Prevention, Registration, and the Public's 'Right' to Know,"* 48 Vand. L. Rev. 219, 245-46 (1995). This retributive, stigmatizing community environment has the opposite effect of rehabilitative

[16] The fact that the panel may have relied on a misstatement of Alaska law, is respectfully irrelevant. *Pet. Br. 39-40.* The fact remains that the ASORA vests exceedingly broad discretion regarding the manner in which it may be implemented, and it does not foreclose forced in-person registration or even unannounced visits to the registrant's home address. *Id.* Indeed, the asserted purpose of the ASORA is to collect and disseminate truthful information to the public. *Pet. Br. 25.* The government cannot insure truthfulness without seeking to verify the information. Verification would have to come in the form of inspecting vehicles to determine whether the identification numbers provided are accurate, interviewing relatives to determine whether other vehicles are at the registrant's disposal, and verifying home addresses, etc. In light of the broad discretion conferred by the ASORA, nothing stops the department from latter adopting a regulation that requires in-person reporting. *Alaska Stat.* 12.63.010(d)(2) (1998).

treatment, which is the second proposed policy goal of these registration laws. *Id.* Public notification laws have created an atmosphere where vigilantism, and public condemnation is the norm, rehabilitation is the exception. *Silva: Dial, 1-900-PERVERT, and Other Statutory Measures That Provide Public Notification of Sex Offenders*, 48 SMU. L. Rev. 1962, 1983-84 [1995]. Under the guise of protecting the public, these laws have been the cause of homes being burned, *id.*, at 1983; of beatings, and of families being run out of town. *Id.*, at 1983-1984. Even small children have been harassed merely because their parent was once convicted of crime. *Id.*, p. 1984. Empirical studies show that these laws do not protect the public, they do not reduce the incidence of crime and in fact, they may be part of the cause of the recent rise in criminal activity. *Id.*, pp. 1979-1980. *See also Note: Battling Sex Offenders: Is Megan's Law An Effective Means Of Achieving Public Safety?*, 19 Seton Hall Leg. J. 519, at 546-549 (1995). Finally, there are ever increasing reported incidents of the wrong person being attacked because the public believed a criminal lived at that address. *Id.*, pp. 558-560. The empirical evidence continues to mount and these case histories show that these offense-based registration and public notification laws do indeed impose an affirmative disability and restraint. *See generally, Brief of New Jersey Public Defender Agency As Amicus Curiae.*

Factor 2, Whether the sanction has historically been regarded as punishment.

Public notification, shaming, ostracism, and community obloquy have historical roots and have traditionally been nothing but punishment. *A. Earle, Curious Punishments of Bygone Days,* 1-2 (1896) (Applewood reprint 1995).

The lower court erred in concluding otherwise. *Pet. App. 18a*. While it is true that regulatory laws are not historically regarded as punishment *Pet. Br. 35*, that truth does not stand where the law regulates the individual, rather than an activity.

Earle, a social historian of the 19th Century noted that "our far-away grandfathers" were most afraid of ridicule and this sensitiveness which made a "lampoon, a jeer, a scoff, [or] a taunt, an unbearable and inflaming offense was of equal force when used against men of the day in punishment for real crimes and offenses." *Id.* Earle's historic account of punishment shows that "contemptuous publicity and personal obloquy" was incorporated into all forms of punishment, and that public exposure as well as public mocking by the whole community was thought to be the most effective form of punishment. *Id.*, at 3. Moreover, the motivation for imposition of publicity and public exposure as a form of punishment is nearly identical to the reasons given for these offense-based Megan's laws – because the public wanted to know who were the criminals, and where they could be found. *A. Earle*, at 87. It was "characteristic of the times," every little community sought to know the offenses and offenders that could hinder the growth and prosperity of their new communities. *Id.*

Not only is publicity regarding one's crime historically regarded as punishment, but forced registration itself has punitive roots – although the historic form of that registration was somewhat different than the modern day computer database. In those historic times discussed by *Earle*, forced registration took the form of wearing a badge that gave the information required, such as the place of residence. *A. Earle*, pp. 89-90.

In more recent times, registration of criminals was never thought to be anything other than punishment. *Note: Criminal Registration Ordinances: Police Control Over Potential Recidivists*, 103 U. of Pa. L. Rev. 60, 61 (1954). This 1930's attempt at criminal registration was not unlike the current trend. Conviction of a crime was the single element that triggered the application of these laws to the individuals affected. *Id.*, at 65. Additionally, the conviction for the covered offenses would trigger the duty to register, regardless of the jurisdiction in which the conviction occurred. *Id.*, at 68, 75. These outdated criminal registration laws required those persons to be fingerprinted, photographed, and they required reports as to the changes in one's residence. *Id.* Like the ASORA, these registration laws all carried significant penalties that could be imposed upon those persons who failed to comply with the registration requirements. *Id.*, at 79. Unlike the ASORA, however, these registration laws were never touted as being anything other than punishment. *See In re Allen Eugene Reed on Habeas Corpus*, 663 P.2d 216, 218 (California 1983).[17]

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[17] Citing: *In re Birch*, 515 P.2d 12 (California 1973) wherein the Court vacated a guilty plea because the defendant had not been advised of his right to counsel and had not been informed that, as a result of his conviction, he would be required to register as a sex offender. The court in *Reed* quoted Justice Tobriner, who wrote the opinion in *Birch*. He concluded that "[a]lthough the stigma of a short jail sentence should eventually fade, the ignominious badge carried by the convicted sex offender can remain for life." *Reed*, at 218. Respondents are confident that if asked, the sex offender would rather spend more time in prison as opposed to a lifetime of scorn and obloquy.

Clearly, registration of convicted offenders and public notification about their crimes must be historically regarded as punishment, and nothing but punishment

Factor 3, Applies only upon a finding of scienter.

The ASORA applies only after conviction for a sex offense and thus, applies only after a finding of scienter. In adopting this element of the effects test, this Court intended a finding of scienter if the intent, bad faith or knowing conduct of the party was at issue in the original crime to which the new sanction is applied. *Mendoza-Martinez*, 372 U.S. at 169 n.24, *citing Helwig*, 188 U.S. at 610-612. In *Helwig*, the sole question presented was whether a statute, which imposed an additional monetary payment for importations constituted a penalty. *Helwig*, 188 U.S. at 611. In reaching its conclusions, the Court held that there could be no question that the statute in question imposed a penalty, "[i]t is because of the action of the importer with relation to the importation in question" that the sanction is applied. *Id.* Thus, if the offense triggers application of the statute, the sanction only comes about upon a finding of scienter. It is not true that scienter can only be found if the ASORA itself requires such a finding, and the underlying offense triggering the ASORA is relevant. *Pet. Br. 36.*

The lower court based its conclusion on interpretation of Alaska's sexual abuse statutes, and the lack of any "intent" requirement. *Pet. App. 18a.* However, scienter can include bad faith or knowing conduct. *See Kurth Ranch*, 511 U.S. at 774. In Alaska, knowing conduct is an element of sexual abuse. *See Van Meter v. State*, 743 P.2d 385, 389

(Alaska App. 1987). Because scienter is an element of the crime triggering the ASORA's application, the ASORA operates upon a finding of scienter.

Factor 4, Whether the ASORA promotes the traditional aims of punishment – retribution and deterrence.

The ASORA promotes traditional aims of punishment – retribution and deterrence. *Pet. Br. 44, Pet. App. 21a.* The lower court found the ASORA primarily retributive because of the lifetime registration requirement, quarterly verification of the same information four times per year, excessive notification and because there was no way to escape the ASORA's effect, and not merely because of a misstatement of the law. *Pet. App. 21a.* Here, petitioners admit that the ASORA is intended to deter future crime, although they wrongly contend that retributive and deterrent goals are insufficient to classify the ASORA as penal. *Pet. Br. 44, See Kurth Ranch, supra* (law was penal due to its excessive effect and deterrent goals).

Factor 5, Whether the ASORA applies to conduct which is already a crime.

This factor is highly relevant to the Ex Post Facto inquiry. *Pet. Br. 44-45.* It makes little difference whether double jeopardy or retroactive punishment is at issue, the question to be answered is whether the law is criminal, and not civil. *Hudson*, 522 U.S. at 93-94. Thus the question whether the ASORA applies to behavior which is already criminal is relevant to this inquiry. *Pet. Br. 44-45.* That question must be answered in the positive because

the ASORA only applies after conviction for a sex offense. Hence, it applies only to conduct which is already a crime.

Factor 6, Whether an alternative purpose may rationally be assigned .

The alternative purpose assigned by the legislature is protection of the public through deterrence of future sex offenses. *Pet. Br. 37, 44*. Although, this alternative purpose is valid, and rational, it does not compel the conclusion that the ASORA is civil rather than penal. *New York v. Burger*, 482 U.S. 691, 693, 712 (1987). Regulatory laws may have the same purpose as penal laws, but regulatory laws are generally distinguishable because they are narrowly drawn to accomplish the stated purpose. *Id.* Thus, although the lower court held that a valid alternative purpose could be assigned to the ASORA, this factor should be given little weight in determining whether the ASORA is penal or civil. *Pet. App. 23a*. It is respectfully asserted that protection of the public through deterrence of future criminal behavior is a constitutionally insufficient purpose to justify such a broad offense-based registration and public notification law that labels the individual with a badge of infamy. At best, the alternative purpose assigned to the ASORA is ambiguous. Hence, evaluation of the ASORA under this factor does not compel the conclusion that the ASORA was intended to be civil.

Factor 7, Whether the ASORA is excessive in relation to its assigned purpose.

In determining whether the ASORA is excessive in relation to its asserted purpose, comparison of the ASORA to laws which regulate the qualifications for the practice of

medicine is completely unreasonable. *Pet. Br. 46, citing, Hawker.* Moreover, it is unreasonable to compare the ASORA to the civil remedial statutes challenged in *Hendricks*, because the ASORA provides no procedure whatsoever to determine future dangerousness based on current evidence. *Pet. Br. 47*. The ASORA does that, which this Court in *Hendricks* said should not be done – it predicts future dangerousness based solely on the past conviction. *Hendricks*, 521 U.S. at 360.

The question whether the ASORA is excessive is not more pertinent to a due process inquiry because the process due under a particular statute depends upon whether the statute in question is regulatory or penal. *Pet. Br. 47-48. Cf., United States v. Salerno*, 481 U.S. 739, 746 (1987). Furthermore, where fundamental rights are abridged by the challenged act, the State must do more than show a reasonable relationship between the purpose and the means employed to achieve the desired purpose. *Pet. Br. 48.* Instead, the State must show both a compelling State interest and that the Act is narrowly tailored to achieve that compelling interest. *Roe v. Wade*, 410 U.S. 113, 155 (1973).

In this instance, fundamental rights are infringed and the legislature knew that to be true when the ASORA was enacted – the legislative findings recognized a specific right of privacy and recognized that the right of privacy was being infringed by the ASORA. *1994 Alaska Sess. Laws, ch. 41, § 1*. Additionally, the right to rehabilitation and reintegration, which is a right protected by due process in Alaska, is infringed as are other rights discussed previously herein. *Ferguson,* 816 P.2d at 139.

Hence, petitioners have the burden of showing that the ASORA is narrowly tailored to meet the goal of protection of the public through deterrence of future conduct.[18]

The registration provisions of the ASORA are excessive in relation to the alternative purpose assigned because if a registrant provides the myriad of information demanded under the ASORA, and all of the information is accurate and does not change, then why should the individual be forced to provide the same information four times per year for the rest of his life? The only purpose for demanding that the registrant provide the same information, four-times per year for the rest of his life and to, each time, swear upon oath that it is true, is to punish. There could be no other legitimate purpose for such a demanding provision.[19]

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[18] Recognizing the impossibility of this task, petitioners attempt to export the excessiveness inquiry back to the lower court, so the lower panel can determine whether the ASORA violates due process. *Pet. App. 66a* (the lower panel did not decide the due process question because it found it unnecessary in light of its decision that the ASORA could not be applied retroactively to the Does). *Id.* However, this factor is highly relevant in determining whether the ASORA is excessive in light of its assigned purpose, and whether it should be classified as penal, rather than civil. *Hendricks, supra.*

[19] Reliance on the Jacob Wetterling Act, 42 U.S.C. § 14071, as a basis for requiring quarterly reporting is misplaced because that Act requires a finding by a court that the individual is a sexually violent predator, or a similar finding through constitutionally adequate and approved procedures. *64 Fed. Reg. 572, 574 (1999).* The government is correct in asserting that States are free to determine which offenders are potentially dangerous; however, the Federal Act clearly requires some type of "procedure" being employed to do so, it does not envision a legislative determination that everyone convicted of a sex offense is a sexually violent predator. *Brief for the United States as Amicus Curiae, pp. 8-10. See 64 Fed. Reg. at 574.* More importantly, the Federal Act does not envision delegation of that determination to the untrained and

(Continued on following page)

The stated goals of the ASORA are far outweighed by the stigmatic and punitive effects associated with forced registration and public notification.[20] Indeed, the empirical evidence shows that in attempting to protect the public, these offense-based Megan's laws put a large segment of the public at substantial risk. *Brief of New Jersey Pubic Defender Agency as Amicus Curiae. See also CR 107, Exhibit 9-11, CR 101, Exhibit 12-16.* That portion of the public who may be housing registrants, providing employment to registrants, or related to registrants by blood or marriage are clearly at substantial risk solely because of the State's action. The assertion that the cause of vigilantism against innocent members of the public is public response and not State action lacks merit. *NAACP v. Alabama*, 357 U.S. 449, 463 (1958). "[I]t is only after the initial exertion of state power represented by the . . . [disclosure], that private action takes hold." *Id.*

In attempting to protect the public through deterrence of future conduct, the ASORA violates fundamental rights, lacks procedures for determining future dangerousness, impedes the ability to find and maintain a home, interferes with the ability to seek and maintain employment,

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reactive public, but that is what Alaska did according to testimony by the Assistant Attorney General when he described his personal experiences. *Resp. App. 8a-9a.* Moreover, the federal act does not require that states apply these registration laws retroactively. *Id.*, at 575, 581.

[20] In making this inquiry the Court is free to examine the effect as evidenced by the actual consequences brought about by application of the ASORA. *Lynce*, 519 U.S. at 441. The Court is not limited to hypothetical effects deemed possible solely by an examination of the statutory provisions.

invades the personal relationships of the registrant, and places the registrant, their families and other members of the public at substantial risk of vigilantism. *CR 107, Exhibits 9-11, CR 101, Exhibits 12-16; Brief of New Jersey Public Defender As Amicus Curiae.* The ASORA labels the offender with a badge of infamy, a label expositive of the crime and tells the public the individual is dangerous and should be ostracized into an inner-community banishment as a new class of citizen.

The ASORA is also excessive because it operates to infringe upon fundamental liberties of persons convicted of a sex offense who pose no threat whatsoever to the public. *See McKune v. Lile*, ___ U.S. ___, 122 S.Ct. 2017, 2024 (2002). Although the rate of recidivism for sex offenders varies depending upon the number of, and category of sex offender studied, *see generally, Brief of N.J. Public Defender, As Amicus Curiae; Brief of United States, As Amicus Curiae,* it is reasonable to conclude that the average recidivism rate is less than 20 percent. *Id.* Even if the government's asserted rates are considered, that means that 50 to 80 percent of the individuals compelled to register and labeled for life are not likely to re-offend and do not pose a threat to public safety. *See Brief of United States As Amicus Curiae.* In Alaska, thousands of individuals, including family, friends, employers, and associates of the registered offender, are unnecessarily subjected to the harmful and punitive effects of the ASORA. Nationally, hundreds of thousands of lives will be destroyed if this Court sanctions enactment and enforcement of broad-based registration and notification laws like the ASORA. Nearly every sex offender and public notification law upheld by the federal courts have tailored the provisions imposed to the actual risk posed by the offender.

See Cutshall v. Sundquist, 193 F.3d 466, 474 (6th Cir.1999); *Roe v. Office of Adult Probation*, 125 F.3d 47, 54 (2d Cir.1997); *E.B. v. Verniero*, 119 F.3d 1077, 1098 (3d Cir.1997); *Doe v. Pataki*, 120 F.3d 1263, 1269-70 (2d Cir.1997). Rather than have professionals assess the degree of risk, Alaska chose to let the untrained, uninformed public, some of whom will and have engaged in vigilantism, make that determination for themselves. *Resp. App. 8a-9a.* Because the ASORA applies to all persons previously convicted, regardless of degree of risk actually posed, it imposes its stigmatizing effect on persons who pose no threat to the public, and it is excessive in relation to the assigned purpose of protecting society through deterrence of future conduct. *See Salerno*, 481 U.S. at 747-749.

CONCLUSION

Objective examination of the ASORA evidences intent that the ASORA is a criminal law. Alternatively, six out of the seven *Mendoza-Martinez* factors weigh heavily in classifying the ASORA as criminal. The ASORA has increased the period of supervision for persons convicted of sex offenses, it operates retroactively to crimes committed before its effective date, and it increases the punishment for past offenses. The ultimate conclusion of the Court of Appeals for the Ninth Circuit, that retroactive application

of the ASORA is barred by the Ex Post Facto Clause, must be affirmed.

Respectfully submitted,

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No. 01-729

In The
Supreme Court of the United States

GLENN G. GODFREY and BRUCE BOTELHO,

Petitioners,

v.

JOHN DOE I, JANE DOE, and JOHN DOE II,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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SENATE BILL 238

IN THE LEGISLATURE FOR THE STATE OF ALASKA

NINETEENTH ALASKA LEGISLATURE – SECOND SESSION
(Introduced 01/24/1996).

A BILL
FOR AN ACT ENTITLED

"An Act relating to the care and regulation of the care of animals; relating to registration of animal abuse offenders; and relating to crimes involving animals."

Section 1: *AS 03.53* is amended by adding new sections to read:

Sec. 03.53.150. ANIMAL ABUSER REGISTRATION. (a) An animal abuser who is physically present in the state shall register with the department as provided in this section. The animal abuser shall register within

(1) seven days of release from an in-state correctional facility;

(2) seven days of conviction for a violation of an animal abuse offense if the animal abuser is not sentenced to a term of incarceration; or

(3) 14 days of becoming physically present in the state.

(b) An animal abuser required to register under (a) of this section shall register by mail or in person at an office of the department. To fulfill the registration requirement, the animal abuser shall complete a registration form that includes, at a minimum, the animal abuser's name, address, place of employment, date of birth, each conviction for an animal abuse offense for which the duty to

register has not terminated under this section, date of animal abuse offense convictions, and place and court of animal abuse offense convictions, all aliases used, and driver's license number.

(c) If an animal abuser changes residence within the state after having registered under (a) of this section, the animal abuser shall provide written notice of the change to the department office located nearest to the new residence within 10 days of the change.

(d) The duty of an animal abuser to comply with the requirements of this section for each animal abuse offense ends 10 years following the animal abuser's unconditional discharge from a conviction for an animal abuse offense.

Alaska Statute, 12.85.010 (1962).

The provisions of this title apply to all criminal actions and proceedings in all courts except where specific provision is otherwise made or where the Rules of Criminal Procedure adopted by the supreme court under its constitutional authority apply. This title governs all proceedings in actions brought after January 1, 1963, and all further proceedings in actions then pending, except to the extent that, in the opinion of the court, their application in a particular action pending when the rules take effect would not be feasible, or would work injustice, in which event, the laws in effect before January 1, 1963, apply.

Alaska Statute, 12.85.020 (1962).

This title may be cited as the Code of Criminal Procedure.